

IOWA DEPARTMENT OF NATURAL RESOURCES

ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF:

Rock Bottom Dairy, Inc. & Bernie G. Bakker

**ADMINISTRATIVE
CONSENT ORDER
NO. 2010-AFO-32**

TO: Bernie G. Bakker, Director
3270 Fir Avenue, Rock Valley
Rock Valley, IA
51246

I. SUMMARY

This Administrative Consent Order (Order) is entered into between Bernie G. Bakker and Rock Bottom Dairy, Inc. (collectively referred to as Rock Bottom Dairy) and the Iowa Department of Natural Resources (Department). Rock Bottom Dairy hereby agrees to pay a penalty in the amount of \$6,000.00 and cease all illegal discharges to waters of the State.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Jeff Prier
IDNR Field Office #3
1900 N. Grand
Spencer, IA 51301
Ph: 712/262-4177

Legal Issues

Carrie Schoenebaum, Attorney
Iowa Department of Natural Resources
Wallace Building 502 E. 9th St.
Des Moines, Iowa 50319-0034
Ph: 515/281-0824

Payment of penalty to:

Iowa Department of Natural Resources
Wallace Building
502 E. 9th St.
Des Moines, Iowa 50319-0034
Attn: Carrie Schoenebaum

II. JURISDICTION

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This Order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1, or Iowa Code Chapter 459 and the rules adopted or permits issued pursuant thereto and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

The parties hereby agree to the following statement of facts:

1. Rock Bottom Dairy owns and or operates a 1500 head dairy freestall confinement where manure is manually pushed into a 24 inch waste flume pipe that flushes to the sand settling lane. The manure is pumped from the lane into a concrete manure storage pit, then pumped into an earthen manure storage basin. The facility is located at Sec 20 T 100 R 46 Allison Township, Lyon County.¹

2. On August 18, 2009, at approximately 8:30 am, Rock Bottom Dairy reported to the Department's emergency response unit that approximately 20,000-30,000 gallons of manure was lost from an above ground transfer pipe overnight. Upon notification, Tom Roos and Jeff Prier, Department Field Office 3 environmental specialists, investigated the spill. While driving to the site, Mr. Roos called Mr. Bakker who stated that the amount spilled was likely 100,000 gallons and that the spill had begun around 12:00 am that day. Mr. Bakker stated that he had placed a dike along the drive so that the manure would enter the open lot containment system and that a PVC sleeve had been put over the tile intake. The manure spilled entered a tributary to Mud Creek which flows to the Rock River.

Throughout the day Department environmental specialists collected laboratory samples, took photographs, and made the following observations at the below sites:

Site #1: 120th Street, (downstream from point of discharge) at this location an earthen dam had been constructed, a strong manure odor was detected and dead fish were observed.

Site #2: K-30 Bridge, (downstream from point of discharge) at this location a manure odor was detected however, no dead fish were observed.

¹ The deed to this land is held by Bernie G. Bakker.

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Site #3 Eagle Avenue (upstream from point of discharge), at this site a manure odor was not detected and live fish were observed.

The following table summarizes the laboratory samples taken during the August 18, 2009, investigation. The samples tested for the following pollutants: ammonia, Nitrogen, E. coli, total biological oxygen demand (Total BOD), and Temperature. The testing was performed by the University of Iowa Hygienic Laboratory (UHL).

	E. coli (MPN/100mL)	Ammonia Nitrogen	Total BOD (5 Day)	Temp
Site # 1	140,000	210 mg/L	1400 mg/L	18 C
Site #2	4600	3.7 mg/L	4 mg/L	19 C
Site #3	630	0.08 mg/L	<2 mg/L	16 C

3. On August 19, 2009, the Department returned to the site and performed field tests, assessed water quality, took photographs and made the following observations at the below sites:

Site #4: Mud Creek at 140th Avenue (downstream from point of discharge) field samples (ammonia 0.6 ppm and dissolved oxygen 6.0 ppm) indicated that at this time manure had not reached this area of the stream.

Site #5: West of K-30 Bridge, (downstream from containment dam), field samples (ammonia 1.0 ppm and dissolved oxygen 8.0 ppm) indicated that manure had not reached this area of the stream.

Site #6: Between the containment dam and K-30 bridge, (downstream from point of discharge) at this location dead and dying fish were observed. Field samples (ammonia 30 ppm) indicated that manure had reached this area of the stream. However, the water in the culvert was standing which indicated that the containment dam was working properly and the water in the culvert was clear which indicated that no manure flowed into this area overnight.

Site #7: Downstream of containment dam, slightly upstream of sampling point 2 (downstream from point of discharge). Field samples indicated that ammonia levels were still elevated (ammonia levels were between 90-120 ppm) and a manure odor was detected. However, no dead fish were observed. It appeared that manure did not breach the containment dam overnight. Field samples indicated that ammonia levels were between 90-120 ppm.

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Site #1: 120th Street (downstream from point of discharge), the Department observed a commercial applicator hauling two 7,000 gallon tanks of manure from this location to the manure storage basin.

4. On August 20, 2009, the Department returned to the site and performed field tests, took photographs and made the following observation at the below site:

Site #4: Mud Creek at 140th Avenue (downstream from point of discharge) field samples indicated that at this time manure had not reached this area (ammonia 20 ppm). In addition, the water in the creek was clear.

5. On August 21, 2009, the Department returned to the site and performed a field test at the location of Site #1. This test revealed that ammonia levels were still elevated; because of this, Rock Bottom Dairy continued to pump manure out of the stream onto the pasture and crop grounds. This was discontinued later that evening.

6. The test results and observations indicate that the manure released from Rock Bottom Dairy contaminated a tributary of Mud Creek which flows to the Rock River. Mike Hawkins, Jim Berquist and D.J. Vogeler, of the Department's Fisheries Bureau, concluded that 1.5 miles of stream was affected by the spill, a total of 1,431 fish were killed, valued at \$518.09 (plus investigation costs of \$529.83).

7. On September 22, 2009, a Notice of Violation letter and Report of Investigation was sent to Rock Bottom Dairy for the violations associated with the fish kill. The letter also informed Rock Bottom Dairy that these violations were being referred for further enforcement.

IV. CONCLUSIONS OF LAW

The parties hereby agree to the following conclusions of law:

1. Iowa Code section 455B.186 and 567 IAC 62.1 prohibit the discharge of pollutants into waters of the State, except for adequately treated pollutants discharged pursuant to a permit issued by the Department. A permit has not been issued for this facility therefore, the foregoing facts establish that this provision has been violated.

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2. Iowa Code section 455B.173 authorizes the Environmental Protection Commission (Commission) to adopt rules establishing water quality and discharge standards relating to the operation and construction of animal feeding operations and the conditions under which the Department shall issue permits to such operations, and relating to the disposal of manure resulting from animal feeding operations. The Commission has done so at 567 IAC Chapters 60-65. Chapter 65, in particular, relates to animal feeding operations.

3. Iowa Code section 459.103 requires the Commission to adopt rules related to the construction or operation of animal feeding operations, including minimum manure control requirements. The Commission has done so at 567 IAC Chapter 65.

4. Iowa Code subsection 459.311(1) and 567 IAC 65.2(3), require that all manure produced in a confinement feeding operation be retained between periods of waste disposal and prohibit the discharge of manure into a water of the State or into a tile line that discharges to water of the State. 567 IAC 65.2(7) requires manure to be removed from control facilities and applied to land so as to not allow surface or ground water pollution. The above facts disclose violations of one or more of these statutory and rule provisions.

5. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. The above facts indicate a violation of one or more of these criteria.

6. 567 IAC 65.2(9) requires that

[a] release, as defined in rule 65.1(455B), shall be reported to the department as provided in this subrule. This subrule does not apply to land application of manure in compliance with these rules.

a. Notification. A person storing, handling, transporting, or land-applying manure from a confinement feeding operation who becomes aware of a release shall notify the department of the occurrence of release as soon as possible but not later than six hours

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after the onset or discovery of the release by contacting the department at (515)281-8694. The local police department or the office of the sheriff of the affected county shall also be contacted within the same time period if the spill involves a public roadway and public safety could be threatened. Reports made pursuant to this rule shall be confirmed in writing as provided in 65 2(9)"c."

The release was discovered by Rock Bottom Dairy at approximately 12:00 am on August 18, 2009, however it was not reported to the Department until 8:30 am of that day. Therefore, the above stated facts show non-compliance with this provision.

7. Iowa Code subsection 481A.151(1) provides a person who is liable for polluting a water of the State in violation of state law is also liable to pay restitution to the Department for injury to a wild animal by the pollution. The amount of the restitution shall also include the Department's administrative costs for investigating the incident.

V. ORDER

THEREFORE, the Department hereby orders and Rock Bottom Dairy consents to do the following:

1. In the future Rock Bottom Dairy shall properly retain its manure;
2. Rock Bottom Dairy shall cease all illegal discharges to waters of the State;
3. Rock Bottom Dairy shall pay fish restitution of \$1047.92 within 30 days of the date the Director signs this order; and
4. Rock Bottom Dairy shall pay a penalty in the amount of \$6,000.00 in accordance with the following payment plan;
 1. \$1,500.00 shall be due no later than July 1, 2010;
 2. \$1,500.00 shall be due no later than January 1, 2011;
 3. \$1,500.00 shall be due no later than July 1, 2011; and
 4. \$1,500.00 shall be due no later than January 1, 2012.

If any of the above payments are not received in accordance with the scheduled dates, the remainder of the penalty shall be due immediately. Failure to pay the penalty in full may result in referral to the Iowa Attorney General's Office or to the Iowa Department of Revenue and Finance.

VI. PENALTY

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1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day for violations of water pollution control laws; more severe criminal sanctions are also provided.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties; 567 IAC Chapter 10. Pursuant to rule 567 IAC 10.2, the Department has determined that the most equitable and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty. The administrative penalty is determined as follows:

a. Economic Benefit. Rock Bottom Dairy saved time and money by not instructing its staff to conduct visual inspections of the hose used to pump manure. The spill occurred because a clamp used to connect two sections of hose failed. The faulty clamp may have been discovered while pumping if visual inspections occurred. However, because the Department has decided to handle this matter administratively a penalty is not assessed for this factor.

b. Gravity of the Violation. One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the Department has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. This matter involves actual impact to water quality, which was exacerbated by the failure to report the release. Multiple rule and statutory provisions were violated including failure to retain manure, failure to timely report a release, discharge to water of the State, and violation of water quality standards. The violations threaten the integrity of the water quality program. For these reasons, \$3,000.00 per day could be assessed for this factor for each of the four above-cited violations. However, in view of the maximum administrative penalty and the Culpability factor, below, \$5,000.00 is assessed for this factor.

c. Culpability. Pumping thousands of gallons of manure is an activity that poses a substantial environmental threat and therefore, demands the highest level of care. For a release of this magnitude to go undetected, for so long how long, shows failure on behalf of Rock Bottom Dairy to apply the appropriate

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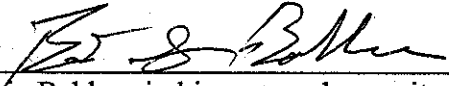
standard of care. If an employee would have conducted a visual inspection of the above ground hose being used to pump the manure, the amount released to the waters of the State would likely have been substantially reduced if not completely avoided. Therefore, \$1,000.00 is assessed for culpability.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.175 and 561 IAC 7.4(1), as adopted by reference by 567 IAC Chapter 7, authorize a written notice of appeal to the Commission. This Order is entered into knowingly by and with the consent of Rock Bottom Dairy. By signature to this Order, all rights to appeal this Order are waived.

VIII. NONCOMPLIANCE

Compliance with section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of additional administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.



Bernie Bakker, in his personal capacity
and as Director of Rock Bottom Dairy, Inc.

Dated this 15 day of
June, 2010.



RICHARD A. LEOPOLD DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 23 day of
June, 2010.

EPA, Field Office 3, Carrie Schoenebaum; Jeff Prier, VIII D. 1 (a) 3 (a) (b).